

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED REVISIONS
TO THE STATE IMPLEMENTATION PLAN
FOR THE SAN JUAN GENERATING STATION
BEST AVAILABLE RETROFIT TECHNOLOGY
DETERMINATION**

No. EIB 13- 02 (R)

PETITION FOR REGULATORY CHANGE

The New Mexico Environment Department ("Department"), pursuant to 20.1.1 NMAC - Rulemaking Procedures, petitions the Environmental Improvement Board ("Board") to approve a revision to the New Mexico regional haze State Implementation Plan ("SIP") with respect to the best available retrofit technology ("BART") determination for the San Juan Generating Station. The Board is authorized to adopt the proposed revisions by the Air Quality Control Act, NMSA 1978, §§ 74-2-2 et seq., and specifically by NMSA 1978 § 74-2-5.C (1). The proposed SIP revisions and a statement of the reasons for their adoption are attached.

The Department requests that the Board schedule the hearing during its regular meeting in September, 2013. The Department anticipates that the time necessary to conduct the hearing will be one to two days.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
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STATEMENT OF REASONS

The New Mexico Environment Department (“Department”) proposes revisions to the regional haze State Implementation Plan (“SIP”) approved by the New Mexico Environmental Improvement Board (“Board”) on June 3, 2011. The revisions affect only the determination of the best available retrofit technology (“BART”) for the San Juan Generating Station (“San Juan”) operated by Public Service Company of New Mexico (“PNM”). The remainder of the 2011 regional haze SIP was approved by the U.S. Environmental Protection Agency (“EPA”) on November 27, 2012. *See* 77 Fed. Reg. 70,693 (Nov. 27, 2012). These proposed SIP revisions, if adopted by the Board and approved by EPA, would effectuate a tentative agreement reached between the State of New Mexico, PNM, and the EPA, to settle litigation over EPA’s federal implementation plan (“FIP”) for BART at San Juan.

Background

The federal regional haze rule, 40 C.F.R. §§ 51.308 – 51.309, requires States to submit SIPs to address visibility impairment caused by regional haze in 156 federally-protected parks and wilderness areas, known as Class I areas, including nine such areas in New Mexico. The rule provides for two alternative approaches, contained in 40 C.F.R. § 51.308 and 40 C.F.R. § 51.309. (“Sections 308 and 309” respectively). Section 309 is an alternative available only to certain western states and tribes, and contains provisions to implement the recommendations of the Grand Canyon Visibility Transport Commission (“GCVTC”). Section 308 provides the default approach for states that are not eligible for, or chose not to opt into, the Section 309 approach.

The Board approved a SIP under Section 309 on December 31, 2003, and Governor Richardson then submitted the SIP to EPA for approval. In accordance with the provisions of the regional haze rule then applicable, the 2003 SIP addressed New Mexico’s BART obligations with respect to sulfur dioxide (“SO₂”) by creating SO₂ emission milestones and a “backstop” emissions trading program, but deferred BART regulations with respect to particulate matter (“PM”) and nitrogen oxides (“NO_x”).

EPA action on the SIP was delayed in part due to two challenges to the regional haze rule in the U.S. Court of Appeals for the District of Columbia Circuit, and additional rule makings necessitated by the decisions in those cases. See *American Corn Growers v. EPA* 291 F.3d 1 (D.C. Cir. 2002); *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005). In response to the latter case, the EPA issued a revised rule in 2006, which corrected the provisions struck down by the court, and allowed States to submit revised SIPs under Section 309 by December 17, 2007. 71 Fed. Reg. 60612 (Oct. 13, 2006). New Mexico, however, did not meet the 2007 deadline.

In February 2011, the Department proposed a revised Section 309 SIP, which was approved by the Board on June 3, 2011. Thereafter, Governor Martinez submitted the SIP to EPA, which received it on July 5, 2011. The 2011 SIP contained BART determinations for PM and NO_x for San Juan, which is the only facility in New Mexico that is subject to BART requirements under the CAA and EPA's implementing regulations. Specifically, for NO_x at San Juan, the SIP determined that BART is selective non-catalytic reduction ("SNCR"), with an emission limit of 0.23 lb/MMBtu.

Notwithstanding New Mexico's BART determination, on August 22, 2011, EPA promulgated a federal implementation plan ("FIP") containing a different NO_x BART determination for San Juan – selective catalytic reduction ("SCR"), with an emission limit of 0.05 lbs/MMBtu. 76 Fed. Reg. 52,388 (Aug. 22, 2011). In explaining the timing of its promulgation of the FIP, EPA pointed to the existence of a consent decree deadline for final action on a separate but related part of the CAA, the visibility element of the interstate transport provisions at Section 110(a)(2)(D). Because EPA was obligated to act under that provision by August 5, 2011,¹ and because EPA determined that additional NO_x reductions from San Juan were necessary to satisfy Section 110(a)(2)(d), EPA took the position that the interests of certainty and efficiency would best be served by promulgating a NO_x BART FIP for San Juan at the same time.

New Mexico sought judicial review of the NO_x BART FIP in the U.S. Court of Appeals for the Tenth Circuit, as provided for in the CAA, arguing among other things that EPA must first evaluate and approve or disapprove the NO_x BART portion of the SIP before promulgating a FIP addressing that requirement. That case (consolidated with a separate appeal by PNM) has been briefed, and oral arguments were held on October 23, 2012, but the court has not issued a decision.

Throughout the course of the litigation, discussions among the parties continued, and on February 15, 2013, New Mexico, EPA, and PNM signed a tentative settlement agreement that, when fully implemented, would dispose of the case. The terms of the tentative settlement are recorded in a "Term Sheet." The Term Sheet provides for the revisions to New Mexico's SIP with respect to BART for San Juan that are the subject of this requested regulatory change.

The core agreement as provided in the Term Sheet is that PNM would retire Units 2 and 3 at San Juan by December 31, 2017, and install the SIP technology (SNCR) on Units 1 and 4 within 15 months of EPA approval of this revised SIP.

¹ EPA Administrator Lisa P. Jackson signed the FIP on August 4, 2011. The FIP was then published in the Federal Register on August 22, 2011.

Request for Regulatory Change

This request for regulatory change proposes to replace in the 2011 “§ 309(g)” SIP :

- Chapter 10: Best Available Retrofit Technology (BART) Evaluation,
- Appendix D, New Mexico Environment Department BART Determination for San Juan Generating Station

with revised versions of those documents. The documentation relied upon in making the BART determination contained in Appendix D will be presented as exhibits and will be available for public review.

In addition, the request adds to the SIP Appendix G, the aforementioned Term Sheet.

The purpose of this change is to complete New Mexico’s outstanding obligations for regional haze. Moreover, as discussed within the SIP and as will be further demonstrated by testimony and evidence presented at the hearing if it is granted, the proposed SIP revisions would:

- Result in the following percent reductions of pollutant emissions, as compared to current emissions: nitrogen oxides 62%, sulfur dioxide 67%, and particulate matter 50%.
- Achieve visibility improvement at all affected Class I areas that are virtually indistinguishable to the human eye from EPA’s FIP, at substantially lower costs. Specifically, the total capital costs of the FIP are estimated at \$861,871,000, as compared to \$34,556,000 for the installation of SNCR at Units 1 and 4.
- Reduce raw material usage at the facility, including limestone, activated carbon, coal and No. 2 diesel oil.
- Result in a substantial decrease in particulate matter emissions from coal processing and handling.
- Decrease water usage by up to approximately 53%.

This “statement of reasons for the regulatory change” accompanying the petition is submitted in accordance with 20.1.1.300.B NMAC. If the hearing is granted, the Department will also submit a “proposed statement of reasons for adoption” at the time of filing a notice of intent, in accordance with 20.1.1.302 NMAC.